SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 216

REAL ESTATE CORPORATION, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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I.

PRELIMINARY STATEMENT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner in the above-entitled cause presents this its petition for a rehearing of the order of October 8, 1962, denying certiorari.

In support of the petition for rehearing petitioner files the following brief, respectfully directing attention to ju-

dicial and text expositions of conflict between the circuits, not previously presented.

II.

ARGUMENT

A. Circuit Judge Wisdom's Statement of Conflict Between Circuits.

Counsel for petitioner did not point out with sufficient clarity one of the basic grounds urged for granting the writ of certiorari—the conflict of decisions between the Courts of Appeal on the interpretation of the statute[1] excluding from the benefit of capital gains "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business". The point was made in the original petition for certiorari at pages 8 and 9.

Petitioner now respectfully desires to direct the attention of the Court to the following statement of the conflict between the Ninth Circuit and the Fifth Circuit found in the dissenting opinion of Circuit Judge Wisdom in *Cole* v. *Usry*:

> "This is not unusual in tax refund cases, but when such law-finding requires the jury to understand and apply *a section of the Internal Revenue Code so uncertain that it means one thing in the Ninth Circuit and another thing in the Fifth Circuit* * * *" (Emphasis ours).

In concluding his dissent, Judge Wisdom again emphasizes that interpretation of the statute is a doubtful and unsettled legal question, in these words:

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1. 26 USC, 1952 Ed., Sec. 117, pp. 3372, 3374.

2. 294 F.2d 426, 430, 432.

> "In my humble judgment, the only thing clearly irrational about this case is that the law compels a jury of laymen to function as a court in deciding a doubtful, *unsettled, legal question* that would be a toss-up if it were submitted to a court composed of tax experts." (Emphasis ours).

This is a clear and convincing exposition of the conflict between the circuits by an eminent jurist—and a more forceful one has not been found. But there are other expositions of the conflict and inconsistency between the circuits from the leading text on the subject of Federal taxation and they follow in the next section of this brief.

B. Extracts from Mertens Law of Federal Income Taxation and from Leading Article in Yale Law Journal Emphasizing Inconsistency of Results in Interpreting the Statute.

The inconsistency resulting from interpretation of the cited statute evokes the following comment by Mertens:[3]

> "But the legislative approach has not been the product of a clear or consistent underlying policy or theoretical base, and the practice itself, marred by special-interest distortions, *likewise has reflected indecision and inconsistency.*" (Emphasis ours)

With further reference to the difficulty experienced by the Courts in the interpretation of the statute, the following statement is made in Mertens:[4]

> "The term 'capital assets' does not include property 'held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.' These words have given rise to as much litigation as any other in the entire Code."

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3. Mertens Law of Federal Income Taxation, Vol. 3B, p. 5.
4. Mertens Law of Federal Income Taxation, Vol. 3B, p. 74.

Again pointing out the inconsistent results of interpretation of the various factors to be considered in solving problems presented under the statute, this comment is made in Mertens:[5]

> "While the attention which has been given to these factors requires that they be given careful consideration, it is well to remember that they have neither precise nor determinative weight, *and that inconsistent results have followed in their presence.*" (Emphasis ours)

Quoting from the Yale Law Journal,[6] Mertens then reinforces the statement of inconsistency:

> "For each of the supposedly fundamental principles enunciated by the courts in attempting to apply this clause, a contrary quotation can usually be found which vitiates its force. *This tends to prevent the development of a corpus of consistent doctrine available for the resolution of new problems as they arise.*" (Emphasis ours).

III.

CONCLUSION

As pointed out by Circuit Judge Wisdom in *Cole* v. *Usry*,[7] the section of the Internal Revenue Code under review means one thing in the Ninth Circuit and another thing in the Fifth Circuit—and it now means yet another thing in the Tenth Circuit, if that Court's decision is permitted to stand.

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5. Mertens Law of Federal Income Taxation, Vol. 3B, p. 623.

6. Miller, The Capital Asset Concept: a Critique of Capital Gains Taxation: I 59 Yale Law Journal 837, 877 (1950).

7. 294 F.2d 426, 430, 432.

The conflict between the circuits and the inconsistency of their decisions has been demonstrated by the quotation from the opinion of Circuit Judge Wisdom; by the quotations from Mertens; and by the extract from a leading article in the Yale Law Journal.

It is therefore again very respectfully prayed that the order denying the petition for certiorari be vacated; that certiorari be granted; and that the questions and conflicts presented be resolved.

Dated October 30, 1962.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that the foregoing Petition for Rehearing of the Order Denying the Petition for Writ of Certiorari in this proceeding is presented in good faith and not for delay; and the petition is restricted to one of the grounds specified in paragraph 2 of Rule 58.

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